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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE FARM MUTUAL ATUOMOBILE INSURANCE COMPANY	*	
Plaintiff and Respondent	*	
vs.	*	APPELLANT'S BRIEF
THOMAS LAYTON MASTBAUM and KATHLEEN MARIE MASTBAUM	*	No. 19779
Defendants and Appellants	*	

APPELLANTS' BRIEF

APPEAL FROM THE ORDER AND JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT SITTING IN AN DFOR CACHE COUNTY, STATE OF UTAH

HONORABLE VENOY CHRISTOFFERSEN, DISTRICT JUDGE

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NATURE OF CASE

Plaintiff brought this action in the District Court of Cache County, Civil Action No. 21772 against the Defendant for declaratory relief claiming that the Family Exlusions Provision of the insurance policy issued to the Defendant, Thomas Layton Mastbaum, excuses the Plaintiff from defending the Defendant, Thomas Layton Mastbaum, in a civil action filed against him by his wife resulting from an automobile action on May 30, 1981, near Garden City, Utah. A civil action filed in the District Court of Cache County, entitled Kathleen Marie Mastbaum v. Thomas Layton Mastbaum, Civil no. 21668, is civil action seeking damages for injuries sustained to Mrs. Mastbaum resulting from the above mentioned accident.

Plaintiff, State Farm, further sought declaratory judgment in this separate suit seeking determination that the insurance policy in question does not provide coverage for the benefit of Kathleen Marie Mastbaum and that the Plaintiff had no duty to adjust or to pay the claim which may be awarded in her favor in such litigation, Civil No. 21668.

Defendants Mastbaums' Counterclaim in this action asserting that the Family Exclusion Provision of insurance contract and the Doctrine of Interspousal Tort Immunity was violative of public policy in general and violative of public policy behind the Utah Safety Responsibility Act, Utah Code Annotated, Section 30-2-4; and Utah Constitution Article 1, Section 11.

DISPOSITION OF LOWER COURT

The District Court of Cache County rendered a Summary Judgment in favor of the Plaintiff and against the Defendants upholding the validity of the Family Exclusion Provision of the insurance contract in question. That the suit filed by Mrs. Mastbaum against Mr. Mastbaum, Civil No. 21668, is barred because of the doctrine of Interspousal Tort Immunity and the Family Exclusion Provision. Summary Judgment on both issues was entered by the Court in favor of the Plaintiff and against the two Defendants on the 26th of January, 1984.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Judgment entered by the Trial Court. That an order of this Court be entered determining that

the Family Exclusion Provisions of the insurance contract of the Plaintiff in the policy issued to the Defendant, Thomas Layton Mastbaum, be determined violative of the public policy of the State of Utah and violative of public policy behind the Utah Safety Responsibility Act, UCA 30-2-14, and Utah Constitution Article I, Section 11, and that the Court further enter its Order that Utah follow the modern trend of authorities in declaring the doctrine of Interspousal Tort Immunity does not exist in the State of Utah.

STATEMENT OF FACTS

On or about May 9, 1983, the Defendant, Kathleen Marie Mastbaum, as Plaintiff, filed civil action against her husband, Thomas Layton Mastbaum, as Defendant, in the District Court of Cache County, Civil No. 21668. In the Complaint Mrs. Mastbaum alleges that her husband/Defendant was the driver of an automobile in which the Plaintiff was a passenger. That Defendant, while under the influence of intoxicated liquor, drove the said automobile into an oncoming vehicle near Garden City, Rich County, Utah, on May 30, 1981, when the Plaintiff sustained severe personal injuries including a broken back. Mrs. Mastbaum further claims permanent injuries. The Defendant, Thomas Layton Mastbaum, at the time of the accident had an insurance policy with the Plaintiff/Respondent State Farm Mutual Automobile Insurance Company. The Plaintiff/Respondent, State Farm Mutual Automobile Insurance Company filed an answer to the above suit and then commenced this separate action for declaratory judgment, which

Complaint was filed in the District Court of Cache County, Utah on or about the 14th day of June, 1983, seeking to avoid responsibility for payment of any sums due to Mrs. Mastbaum and seeking the declaration of the Trial Court that the Family Exclusion Provision of the insurance contract was valid and enforceable, and, Plaintiff/Respondent was not responsible to defend the Defendant in Civil action no. 21668 or pay any damages or make any settlement in connection therewith. The Defendants, Mastbaums in their answer asserted affirmative defenses and counterclaims.

The Trial Court rendered judgment in favor of the Plaintiff on or about the 26th day of January, 1984 on both issues. That on the 21st day of February, 1984 notice of appeal was filed with this Court by Defendants.

ARGUMENT

POINT I

THE DOCTRINE OF INTERSPOUSAL TORT IMMUNITY IS VIOLATIVE OF PUBLIC POLICY OF THE STATE OF UTAH AND THEREFORE IT DOES NOT BAR KATHLEEN MARIE MASTBAUM'S SUIT AGAINST HER HUSBAND, THOMAS LAYTON MASTBAUM IN CIVIL ACTION NO. 21668, DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH.

The Doctrine of Interspousal Tort immunity is based upon the archaic common law notion that a wife had disabilities which prevented her from suing and being sued. This perception of the wife's disabilities was based upon a fiction that a husband and wife were one, and that the wife's individuality during marriage became merged in that of her husband. All of her personal property which the husband could reduce to possession during marriage became his, and he had the right of possession, management and control of her real estate. During marriage she could not sue for damages to her person or property but such suits were brought in the name of the husband and any damages recovered belonged to him. (See Stoker v. Stoker 616 P.2d 590, 591 (Utah 1980) quoting from Cooley's Blackstone, Volume 1, Book 1, Chapter 15 page 294.) Under that concept the wife could not sue her husband because of the procedural difficulty which would require the husband to sue himself, and also because she would acquire no substantive right against him since he would be the owner of whatever he recovered in the suit. (Taylor v. Patten, 275 P.2d 696, 697 (Utah 1954.) Thus, prior to the adoption of the Married Women's Acts, the common law view was that upon marriage the

husband and wife became one, and she could not sue that entity of which she was a part.

Under Utah's Married Women's Act, this antiquated view of the wife's legal rights is done away with. U.C.A. §30-2-4 (1953 as amended) states that:

> A wife may receive the wages for her personal labor, maintain an action therefor in her own name and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical teatment and other expenses paid or assumed by the husband." (emphasis added)

Defendant submits, that the above-quoted statute as interpreted in Stoker v. Stoker 616 P.2d 590, 591, clearly states that the Doctrine of Interspousal Immunity is violative of public policy.

Plaintiff strongly contends that under Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963), the Interspousal Immunity Doctrine is still applicable to nonintentional tort cases between spouses. However, Plaintiff seriouslv overlooks the affect of the Stoker case on the Rubalcava case. The Court in Stoker 616 P.2d at 590, stated that in:

> ...Rubalcava v. Gisseman and the Union Pacific Railroad., this court held the statutes considered Taylor v. Patten did not compel the conclusion tort actions should also be included in the abrogation of immunity, with actions on contracts and property matters. We do not agree. (emphasis added)

Plaintiff attempts to distinguish the Stoker case from the Rubalcava case by saying Stoker dealt with intentional torts. No where in Stoker does the Court make that distinction. In fact, as stated above, the only place in Stoker that Rubalcava case is cited is in the same paragraph with Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954), which was an intentional tort suit between spouses. Therefore, in Stoker, Supra, at 590, the Court inferred that it did not agree with Rubalcava (an unintentional tort case), and that "tort actions" should also be included in the abrogation of immunity. Thus, overruling Rubalcava v. Gisseman.

In support of its overruling Rubalcava v. Gisseman, the Court in Stoker v. Stoker further declared at 592:

> Our holding today reaffirms the Legislative abrogation of Interspousal Immunity. That the trend in our sister states is certainly in consonance with our holding today: See 92 A.L.R.3d 901, at p. 923, et seq.

The court unequivocally held that interspousal immunity had been abrogated. No distinction was made between an intentional or unintentional tort as plaintiff contends.

In reference to the Utah's Married Women's Act, supra, the Court in Stoker, 616 P.2d at 591 stated:

> The statute authorizes her to prosecute and defend all actions for the preservation and protection of her rights and property, as if unmarried. It speaks of rights and of property in the disjunctive, and, all actions for the preservation and protection of her rights would certainly include a right to be free from an intentional tort of her husband. (emphasis added)

Plaintiff in its memorandum in the Trial Court states that the Court in the Stoker case created "some confusion" on this issue. Plaintiff asserts that the Rubalcava case stands for the point that U.C.A. §30-2-4 does not allow a wife to sue her husband, only third parties. As stated above Stoker v. Stoker overrules Rubalcava, but a careful reading of Stoker v.Stoker at 591, shows the court held that U.C.A. §30-2-4 speaks of the wife's rights and of property in the "disjunctive." In interpreting the statute's language, which speaks of rights and property in the disjunctive, the Court was holding that the statute uses the phrase "rights and property" in the alternative. Therefore, "no confusion" exists as asserted by Plaintiff because just as "all actions for the preservation and protection of her rights would certainly include a right to be free from an intentional tort of her husband," so too it should include a right to be free from a negligent tort of her husband. The Court in Stoker held that the statute authorizes her to prosecute and defend "all actions" for the preservation and protection of her rights and property as if unmarried, which certainly would include a negligent tort committed by her husband on her.

To further support its holding that the Interspousal Immunity Doctrine has been abrogated, the Court in Stoker v. Stoker, supra, cites two sections of the Constitution of Utah:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and

> no person shall be barred from prosecuting or defendant before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. (Article I, Section II, Constitution of Utah.)

The court states that the Married Women's Act "was enacted with full knowledge" of these two provisions. Therefore, as the Constitution sets forth "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay." Since the Legislature enacted U.C.A. §30-2-4 (1953 as amended) "with full knowledge" of these Constitutional provisions, then the wife should not be denied remedy for an injury, even if that injury was caused by her husband.

In Stoker the Court further stated that the Married Women's Act is in "derogation of the common law." The Court then quoted U.C.A. §68-3-2 (1953 as amended) which controls how a statute in derogation of the common law should be construed. The statute reads:

> The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

In applying the above-quoted statute the Court at 591 held that:

> To read into our Married Women's Act, a proscription against a wife suing her husband, would be to construe it so strictly as to add a provision which the legislature did not put there.

Therefore, by not allowing defendant in the present case to bring suit against her husband for his tortious conduct would also be construing the Married Women's Act too strictly, which would add a provision that the legislature did not put there. Also, by denying defendant's action because of the antiquated common law Doctrine of Interspousal Tort Immunity, the Court would not be applying U.C.A. §68-3-2 (1953 as amended) properly. Under U.C.A. §68-3-2 (1953 as amended) the statutes (Married Women's Act) are to be liberally construed "with a view to effect the objects of the statutes and to promote justice." Certainly, justice and equity would be achieved by allowing defendant's suit against her husband.

The Court's interpretation of U.C.A. §30-2-4 (1953 as amended) in Stoker is in direct contravention of the court's earlier ruling in Rubalcava. In Rubalcava, 384 P.2d at 392, the Court states that "as will appear below in analyzing our statutes, no basis can be found therein for any distinction between intentional or unintentional torts." Further, the court went on to construe the Married Women's Act as not allowing the wife a right to sue her husband, but only extending to her the right to sue third persons.

In culmination of this direct conflict between Stoker and Rubalcava, the Stoker court at 592 held:

> The old common law fiction is not consonant with the realties of today. One of the strengths of the common law was its ability to change to meet changed conditions. Here, the Legislature did not wait for the common law to change, it made the change for it; and did so at a time when a great many of Utah's sister states were enacting, or had previously enacted, Married Women's Acts. Our holding today reaffirms the Legislative abrogation of Interspousal Immunity. That the trend in our sister states is certainly in consonance with our holding today: See 92 A.L.R.3d 901, at p. 923, et seq. (emphasis added)

Plaintiff in its Trial Memorandum correctly asserts that changes in the Interspousal Tort Immunity Doctrine should be accomplished by the Legislature. As stated in Stoker the Legislature did not wait for the common law to change, "it made the change." Also, the Court stated that its holding "reaffirms the Legislative abrogation of Interspousal Immunity."

Defendant asserts that the archaic common law doctrine of interspousal immunity has been invalidated by the Legislature as expressly held in Stoker, therefore, defendants suit against her husband for his tortious conduct should be allowed.

Finally, Plaintiff in its Trial Memorandum gave great weight to Justice Crockett's dissenting opinion of Stoker. This is fine if an understanding of the law before Stoker is desired, but if an understanding of the present law and its affect is desired, the court in this case should look to the actual law as decided in the majority opinion of Stoker.

POINT II

THE PUBLIC POLICY GROUNDS OF PRESERVING FAMILY HARMONY AND OF PREVENTING FRAUD AND COLLUSION DO NOT JUSTIFY THE APPLICATION OF THE INTERSPOUSAL IMMUNITY DOCTRINE IN THE PRESENT CASE.

In Rubalcava, Supra, the court noted that the two most widely accepted public policy grounds for retaining the doctrine of interspousal immunity were: (1) preserving family harmony, and (2) that where insurance is involved, collusion between spouses would be encouraged. Defendant contends that these were proper policy reasons to support interspousal immunity twenty years ago in the Rubalcava case. But under the Stoker case, the antiquated view of public policy reasons supporting Rubalcava is done away. In Stoker the court expressly states that it is following the trend in its sister states, which is "in consonance" with its holding by citing with approval 92 A.L.R. 3d 901, at p. 923 et seq. (Stoker v. Stoker 616 P2d at 592).

A brief review of the cases of sister states which were cited with approval in the A.L.R. annotation and "in consonance" with Stoker will support defendant's contention that family harmony and a danger of collusion are not persuasive arguments for the retention of interspousal immunity.

Cases found in 92 A.L.R. 3d 901, at p. 923 et seq., which support the argument that interspousal tort immunity is not effective for presentation of marital harmony are hereafter cited.

In Freehe v. Freehe, 500 P.2d 771 (Wash. 1972), which was a negligent tort case for personal injury, the wife's suit was not

barred by interspousal immunity. In it's holding the Court in Freehe reasoned that the motion that a suit for tort damages would destroy the peace and tranquility of the home is a "conclusion without a basis." The Court expressly rejected the notion that family peace and tranquility is a valid reason for precluding a cause of action in tort against the tort-feasor spouse. To support its holding the court in Freehe at 774 stated:

> If a state of peace and tranquility exists between the spouses, then the situation is such that either no action will be commenced or that the spouses--who are, after all, the best guardians of their own peace and tranquility--will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility is nonexistent or tenuous to begin with, then the law's imposition of a technical disability seems more likely to be a bone of contention than a harmonizing factor.

Defendant contends that the Interspousal Tort Immunity Doctrine is counterproductive to marital harmony. If a spouse is not allowed to collect damages for a tortious wrong committed by the other spouse then it is "more likely to be a bone of contention than a harmonizing factor. (Freehe, Supra.) One of the strongest policies in our society is the preservation and encouragement of marriage as an institution. Illicit relationships are, in fact, contrary to Utah law. If a spouse is not allowed to sue the other spouse for tortious actions, then this would not encourage or preserve marital unity or marriage as an institution, but would be a "bone of contention", or encourage some individuals not to marry at all. For this reason, Plaintiff's contention that interspousal immunity maintains marital harmony

is in direct contravention of that socially desirable result.

Along this same line, the Arizona Supreme Court in Fernandez v. Romo, 646 P.2d 878 (Ariz. 1982), abolished the Doctrine of Interspousal Tort Immunity in automobile accident cases. In support of its holding, the Court considered the argument of maintaining interspousal immunity to preserve family harmony, stating:

> We doubt however, that family harmony will be damaged any more by allowing a suit for the negligent infliction of injury upon a spouse than the damage that will be done if the injury goes unredressed.

The Court further stated that the threat to marital harmony is small when there is the existence of liability insurance. The Court compared the disruption of family harmony in a suit between spouses and a suit between parent and child, and stated:

> Secondly, we cannot ignore the almost universal existence of liability insurance, particularly in the automobile accident realm. Where such insurance exists, the domestic tranquility argument is hollow, for in reality the sought after litigation is not between child and parent but between child and parent's insurance carrier. * * * Streenz v. Streenz, 106 Ariz. 86,88,471 P.2d 282, 284 (1970).
>
> We do not believe, considering the existence of automobile accident insurance, that the family harmony or domestic tranquility will be harmed by allowing suit for injuries.

Therefore, Defendant asserts that as in Fernandez v. Romo there is no danger of domestic discord by allowing this suit. Here, as in Fernandez, liability insurance exists and as is evident by the very fact of this suit the litigation is not between husband and wife, but between wife and husband's insurance

carrier (Plaintiff).

Defendant contends that under U.C.A. §30-2-6, (1953 as amended) husband and wife have the right to sue each other concerning property; also under Stoker v. Stoker, supra, husband and wife are permitted to sue each other for intentional tort damages. Therefore, these actions are "as likely to bring about conjugal discord, as are actions for personal torts, yet only personal tort claims have been precluded upon the ground that they would shatter the harmony of the family." (Rupert v. Stienne, 528 P.2d 1013, 1016 (Nev. 1974).) Thus, defendant encourages the court to allow her suit because it is difficult to perceive how a personal action would disrupt the tranquility of the marital state to any greater degree than would actions in property, contract or intentional tort. (See Rogers v. Yellowstone Park Company 539 P.2d 566, 569 (Idaho 1975).)

Other cases so holding that marital harmony is not preserved by the doctrine of interspousal immunity are: Crammer v. Cramer, 379 P.2d 95,96 (Alaska 1963); Klein v. Klein 376 P.2d 70 (Cal. 1962); Self v. Self 376 P.3d 65 (Cal. 1962); Courtney v. Courtney 87 P.2d 660 (Okl. 1938).

Each of the above-mentioned cases concerning marital harmony also considered the argument that the Interspousal Immunity Doctrine prevents fraud and collusion. Plaintiff asserts that without spousal immunity that would lead to fraud and collusion, especially where an insurance company is involved. (Rubalcava

(Rubalcava v. Gisseman, supra, at 390.) This analysis, however, betrays an attitude of mistrust toward the American Judicial System. In Fernandez v. Romo, 882 Supra, the Arizona Supreme Court said:

> The idea of a husband and wife rising from the marriage bed, eating breakfast, and driving in the same automobile to court where, aided by their respective attorneys, they will testify against each other, does little to enhance the perception of justice and leads to a suspicion of collusion and fraud. We think the courts can control this, however, and the attorneys for the insurance company will, we are sure, be quick to detect and bring to the court's attention any evidence of collusive conduct by the parties.

In Rupert v. Stienne, 528 P.2d 1013, 1015 (Nev. 1974) the court stated:

> However, to deny one spouse the opportunity to recover from the tortious conduct of the other because of the possibility of fraud and collusion, belies the centuries old trust in our jury system. An interspousal tort claim should not be saddled with the presumption of fraud ab initio. Courtney v. Courtney, 184 Okl. 395, 87 P.2d 660 (1938). Our adversary system will ferret out the non meritorious claims and dispatch those who would practice fraud upon the courts.

The Court in Freehe v. Freehe, supra, at 775 also discussed the argument that abrogation of the doctrine would allow fraud upon the Court of collusive actions.

> [We reject] this "pessimistic premise" noting that "this line of argument presupposes that courts are so ineffectual and the jury system so imperfect that fradulent claims cannot be distinguished from the legitimate." 500 P.2d at 775.

That court also noted:

> Collusion in one class of cases than another does not warrant courts of law closing the door to all cases of that class. Courts must depend on the efficacy of the

> judicial process to ferret out the meritorious from the fraudulent in particular cases. Id. at 775.

The Idaho Supreme Court in the Rogers v. Yellowstone Park, supra, followed this same logic:

> We reject this contention, for courts in this state presently weed out fraud and collusion in other cases not involving actions between spouses. We find nothing unusual or peculiar in interspousal suits to frustrate the capability of the judicial system to avoid or anticipate such abuses. 529 P.2d at 569.

Therefore, Defendant contends that neither of the rationales of maintaining marital harmony and preventing fraud and collusion are valid public policies for disallowing her suit. Defendant submits that if her suit is denied on these grounds then she will have no remedy. If her suit is denied then the only remedies available would be the inadequate remedies of divorce or criminal law. The Washington court in Freehe v. Freehe, supra, at 774 speaking of the remedies of divorce or criminal law stated:

> It has been observed that neither of these alternatives actually compensate for the damage done, or provides any remedy for the nonintentional negligent torts. . . We have previously observed that while "a criminal action may be adequate to prevent future wrongs. . . it certainly affords no compensation for past injuries." To these reflections we add the observation that limiting the injured party to a divorce or criminal action against his or her tort-feasor spouse is quite inconsistent with any policy of preserving domestic tranquility. Thus the argument based on suggested legal alternatives simply does not withstand analysis.

In conclusion defendant urges this Court to reverse the Trial Court and allow Mrs. Mastbaum suit against her husband. As the late Justice Traynor so aptly stated, "the fictional unity of husband and wife has been substantially violated by overwhelming

evidence that one plus one adds up to two, even in togetherness. Thus, one spouse may recover against another in tort." (People v. Pierce, 395 P.2d 893, 894 (Cal. 1964).)

POINT III

THE FAMILY EXCLUSION CLAUSE CONTAINED IN PLAINTIFF'S INSURANCE POLICY IS VOID AND UNENFORCEABLE AS IT IS VIOLATIVE OF PUBLIC POLICY UNDER UTAH LAW.

The family exclusion clause in question is contained in Plaintiff's insurance policy, under Section 1 "Liability Coverages." The policy provides the following:

> THIS INSURANCE DOES NOT APPLY UNDER: (h) COVERAGE A ["Bodily injury sustained by other persons"], TO BODILY INJURY TO ANY INSURED OR ANY MEMBER OF THE FAMILY OF AN INSURED RESIDING IN THE SAME HOUSEHOLD AS THE INSURED. (Emphasis contained in policy)

This family exclusion clause is representative of the typical clause used by insurers. All insurers commonly insert this type of clause within their policies to limit their liability. In State Farm Mutual Automobile Insurance Company v. Kay, 26 Utah 2d. 195, 487 P.2d 852 (1971), the Utah Supreme Court held that such clauses were valid and not violative of public policy because they avoid collusive suits, and they protect the insurer from the burden of defending a tort-feasor who is related to the Plaintiff. Defendant submits that even though the abovementioned case is currently thought to be the law in Utah concerning family exclusion clauses, recent case developments have shown that public policy has shifted and that Mrs. Mastbaum's suit should not be denied because of the family exclusion clause.

In State Farm Mutual Auto Insurance Company v. Kay, supra at 856, Defendant Kay asserted the argument that the household exclusion clause was void as a matter of public policy on the ground it was arbitrary and had no valid legal purpose. The Court rejected defendant's argument by relying on the language and holding of a Washington case, State Farm Mutual Automobile Ins. Co. v. Phillips, 467 P.2d 189 (Wash. 1970). The primary language from Phillips which the Utah Supreme Court cited with approval stated:

> The exclusion in question is a so-called "household or family exclusionary clause", the purpose of which is not only to protect insurers from collusion which might possibly arise in intrafamily suits but also to protect them from the natural tendency of one insured to strengthen or enlarge the case against him when it involves members of his household and family. There is a natural disposition to favor those in one's household and close members of one's family. The practical impossibility facing an insurer in defending such an action is readily apparent, and explains why this type of exclusion is inserted in a policy.

This rationale of Phillips became adopted in Utah in Kay.

Defendants contend the rationale that the Court in State Farm Mutual Auto Insurance Company v. Kay, supra, adopted from the Phillips case is no longer valid as public policy. It is important to note that the Washington Supreme Court realized the invalidity of this rationale and overruled Phillips in Mutual of Enumclaw Ins. Co. v. Wiscomb, 622 P.2d 1234 (Wash. 1980). In Wiscomb, which was a case very similar factually to the present case, the Court carefully analyzed the stated policy in Phillips of allowing the family exclusion clauses to prevent collusion,

and to protect insurers from the natural tendency of insureds to enlarge the case when it involves a member of one's family. The Washington Court stated that "as a private contractor, the insurer is ordinarily permitted to limit it's liability unless inconsistent with public policy of statute." Wiscomb, supra. The Wiscomb Court held that the family exclusion clause was violative of public policy, and not supported by the rationale of preventing collusion of burden on insurers of enlarging the case.

The Court in Wiscomb found that the traditional rationales for the exclusion clause were not supportive of their continued existence. Citing Freehe v. Freehe, 500 P.2d 771 (Wash. 1972), which was decided after the Phillips case. The Court then stated at 500 P.2d 775:

> The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.

The Court further states:

> In Freehe, the Court rejected the notion 'that courts are so ineffectual and the jury system is so imperfect that fraudulent claims cannot be distinguished from the legitimate.' Freehe v. Freehe, 81 Wash. 2d 183, 189, 500 P.2d 771 (1972) quoting Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961). That reasoning seems equally applicable to this issue.

Defendant's contention that collusion will run rampant in the area of interspousal immunity absent family exclusion clauses

demonstrates an attitude of mistrust towards the judicial system. Defendant submits that the courts will be able to ferret out the meritorious from the fraudulent claims in most cases just as they do in other cases not involving interfamily suits.

Plaintiff's assertion that the household exclusion clause should be allowed to afford protection to the insurer from collusive suits of family members is "wholly unpersuasive because the exclusion far exceeds the evil which it is designed to protect against; collusion and fraud are the exception rather than the rule." (Wiscomb, supra) The family exclusion clause effectively closes the door to all types of cases in that class justified solely because there may be a greater opportunity for fraud or collusion (Freehe, Supra, at 775). Defendant contends that this is why the collusion argument submitted by Plaintiff is unpersuasive. Defendant contends that this Court should follow the Wiscomb rationale and follow the modern trend of public policy that Utah has shifted towards allowing intrafamily torts to be actionable at law.

POINT IV

UTAH'S SAFETY RESPONSIBILITY ACT IS A DECLARATION OF PUBLIC POLICY VOIDING THE FAMILY EXCLUSION CLAUSE.

It is the Plaintiff's contention that the family exclusion clause (cited at page 19 infra) allows the Plaintiff to avoid liability coverage and the responsibilities of defending an action brought by a member of an insured's household. Such a

position, however, cannot be reconciled with policy declarations of the Utah Safety Responsibility Act, U.C.A. §41-12-1 et seq. (1953 as amended).

The Utah Safety Responsibility Act requires motorists to carry insurance against loss resulting from liability imposed by law for injuries suffered by any person. U.C.A. §41-12-21(b)(2) is typical of such all-inclusive language:

> (b) such owner's policy of liability insurance:
> (1) (. . .)
> (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, in the amounts specified in §41-012-1(k) of this Act. (emphasis added)

In State Farm v. Kay, supra, the Plaintiff finds some refuge in the language of that case regarding a family exclusion clause. Nevertheless, since the Kay case was decided the trend, both in case law and through legislative enactment, has been to the contrary. The Utah No-Fault Insurance Act, U.C.A. §31-41-1 et seq. (1953 as amended), passed subsequent to the Kay case, mandates that an insurer provide statutory miminum insurance coverage. District Court, Judge Omer Call, in a similar case as this, has held in a Memorandum Decision dated June 1, 1982 (Civil No. 16765 Box Elder County, Utah) that:

> The requirements of the Utah No-Fault Insurance Act, incorporating provisions, relating to qualifications

> of insurance policies, of the Utah Safety Responsibility Act, establish a minimum liability coverage requirement of $15,000 per person, $30,000 two or more persons. The policy issued by plaintiff with it's "household or family exclusion clause" is void after those minimum coverage requirements, but is enforceable as to coverage in excess thereof.

(See the opinion in Estate of Neil v. Farmer's Insurance Exchange, 566 P.2d 81, (Nev. 1977) which Judge Call expressly followed.)

It is the defendant's position in this case that not only should the family exclusion clause be held void as to the minimum coverage requirement but should be held void in its entirety. (Emphasis Added)

A number of courts have held that a Financial Responsibility Act similar to the one enacted in Utah effectively voids a household or family exclusion clause because such clauses are inconsistent and violative of public policy as expressed in those acts. In Hughes v. State Farm Mutual Automobile Insurance Company, 236 N.W.2d 870, 882, 884 (1975) the North Dakota Court construed a nearly identical family exclusion clause to be void stating:

> "The basic purpose for the legislature's enactment of financial responsiblity laws was to protect innocent victims of motor vehicle accidents from financial disaster.

The Court went on quoting from a North Dakota legislative report which stated:

> Financial responsibility laws have as their objective the compensation of innocent victims of traffic accidents. Thus, they are more concerned with the solution of economic problems created by traffic accidents than with the prevention of traffic accidents. (emphasis added)

This type of economic reasoning was followed in Atlantic National Insurance Company v. Armstrong, 416 P.2d 801, 805, 806 (Cal. 1966) wherein the Court said:

> A primary purpose of financial responsibility laws is to protect 'that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of the highway by others.' (cites omitted) This goal is no less subverted by limiting the class of persons whose injuries are compensable than by limiting the class of drivers who are insured. Either type of exclusion forces the injured person to rely exclusively upon the financial resources of the driver or owner in seeking compensation for his injuries.

See also Stevens v. State Farm Mutual Automobile Insurance Company, 519 P.2d 1157 (Ariz. App. 1974).

Policy holders also have a reasonable right to expect protection and full coverage from their insurance company. In a recent decision the Montana Supreme Court held that:

> ...the household exclusion clause is invalid due to its failure to 'honor the reasonable expectations' of the purchaser of the policy.

The Court went on to quote from Keeton, "Insurance Rights at Variance with Policy Provisions", 83 Harv. L. Rev. 961, 967 (1970) as follows:

> The objectively reasonably expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

The Court then found that the insurance policy was an "adhesion contract" to be strictly construed against the insurance company.

In dealing with almost identical family exclusion language, a State Farm policy in Hughes, supra, at 885 was also found to be an adhesion contract. The Court said:

> In interpreting the terms of a policy of insurance, we are guided by the familar rule that, as an adhesion contract drawn by the company, it must be construed most strongly against the insurance company. (cites omitted)

The North Dakota Court went on to quote from Continental Casualty Company v. Phoenix Construction Company, 296 P.2d 801 (Cal. 1956) which stated the governing principles for motor vehicle liability policies:

> It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer... . If semantically permissable, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates... . If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against... , the amount of liability.. , or the persons or persons protected.. , the language will be understood in its most inclusive sense, for the benefit of the insured.

In the automobile insurance context, often application for insurance is made and later, if approved, the actual policy is forwarded to the insured without his ever having a chance to preview it. This is normally a one-sided transaction with the insured having little or no bargaining power. For this reason, courts have stated as a general principle of law that insurance contracts are adhesion contracts. A most recent statement to this affect was made in General Motors Acceptance Corporation v.

Martinez, No. 18072 (decided May 24, 1983) wherein the Utah Supreme Court stated:

> Credit life and accident insurance are generally contracts of adhesion which are not negotiated at arm's length and which usually contain various provisions for protection of the interests of the insurance company.

Given the express public policy in the Utah Financial Responsibility Act and the No-Fault Insurance Provisions enacted into statute, and in consideration of the adhesive characteristics of insurance contracts, the family exclusion clause in question herein should be declared void and without effect by this Honorable Court.

CONCLUSION

From the foregoing it is apparent that the Doctrine of Interspousal Tort Immunity has been overruled in the State of Utah or this Court in this decision overruled the same as violating a public policy of the State of Utah and has no application in the State of Utah. That this Court further hold that the Family Exclusion Provision of the Plaintiff's insurance contract violates the public policy of the State of Utah and is violative of the public policy behind the Utah Safety Responsibility Act, 30-2-4 UCA 1953 as amended, and Article I, Section 11 of the Utah Constitution. That the Trial Court be reversed in this matter and that the Defendants be allowed to proceed with the suit presently pending in the District Court of Cache County, Utah, filed as Civil No. 21668, and the Plaintiff herein be required to

defend the Defendant, Thomas Layton Mastbaum said suit and be required to respond to any damages that may be awarded Mrs. Mastbaum against her husband, Thomas Layton Mastbaum, for which he was responsible resulting from the automobile accident of May 30, 1981 near Garden City, Utah. That the Defendants herein be awarded their costs accordingly.

RESPECTFULLY SUBMITTED this 6 day of April, 1984.

HARRIS, PRESTON, GUTKE & CHAMBERS

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B. H. Harris
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Kathleen Marie Mastbaum

JAMES C. JENKINS & ASSOCIATES

By: _____
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Attorney for Defendant/Appellant
Thomas Layton Mastbaum

CERTIFICATE OF MAILING

I hereby certify that I mailed 10 true and correct copies of the above and foregoing APPELLANTS' BRIEF to the Clerk of the Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah 84114, and 2 copies of the said BRIEF to Henry E. Heath, STRONG & HANNI, Sixth Floor, Boston Building, Salt Lake City, Utah 84111 on this 6 day of April, 1984.

_____
B. H. Harris